SUPREME COURT, U. S.
MOTION FILED DEC 26 1967

IN THE

Supreme Court of the United States

October Term, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* and BRIEF FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

EDWIN LONGCOPE
26 Broadway
New York, New York 10004
Attorney for the United Kingdom of Great Britain and Northern Ireland

December 20, 1967

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The United Kingdom of Great Britain and Northern Ireland moves this honorable Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari in the above entitled cases.

Counsel for the petitioner has consented to the filing of this brief, but counsel for the respondent has refused consent. Accordingly, leave of this Court is sought under the terms of Rule 42 of the Court's Revised Rules.

The nature of the movants' interest, and its reasons for believing that these cases present an issue of grave international concern, are set forth in the attached brief.

For the foregoing reasons, it is respectfully requested that this motion for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

For the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,
by its attorney

EDWIN LONGCOPE
26 Broadway
New York, N. Y. 10004

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED KINGDOM AS *AMICUS CURIAE*

Introduction

The United Kingdom of Great Britain and Northern Ireland respectfully submits this brief as *amicus curiae* in support of the petitioner, Alitalia-Linee Aeree Italiane, S.p.A. ("Alitalia") on a writ of certiorari, granted by this Honorable Court, to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above entitled cases on December 16, 1966, 370 F.2d 508.

I.

Nature of the Interest of the United Kingdom.

The United Kingdom is concerned in this case by the unilateral action of the courts of the United States in interpolating into an international agreement—in this instance the Warsaw Convention of 1929[1]—a provision which is not to be found in the express wording of the Convention. The United Kingdom is one of the original signatories to this Convention.

The primary purpose of the drafters of the Warsaw Convention was to achieve unification of all the laws governing international air transportation.[2] The Convention created a right to limitation of liability for the injury or death of a passenger,[3] predicated upon the delivery of a ticket to the passenger.[4] In the instant case the judgments below of the District Court,[5] and the Court of Appeals for the Second Circuit,[6] would read into the Convention a new provision that the failure of a carrier to give, in the passenger ticket, what the courts of the United States deem to be adequate notice of the Convention limits of liability will deny to the carrier the benefits of such limitation.

A recent article has noted that this decision of the courts below is "breaking a chain of hundreds of prece-

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[1] Convention For The Unification of Certain Rules Relating To International Transportation, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876. (effective Oct. 29, 1934) [hereinafter cited as Warsaw Convention].

[2] Warsaw Convention preamble, 49 Stat. 3014.

[3] Warsaw Convention art. 22, para. 1, 49 Stat. 3019.

[4] Warsaw Convention, art. 3, para. 1, 49 Stat. 3015.

[5] *Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F.Supp. 237 (S.D.N.Y. 1966).

[6] *Lisi* v. *Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966).

dents"[7] founded on the express policy of the United States to achieve uniformity of law in the area of international plane disasters in preference to limitation of liability.[8] It is also to be noted that the decisions below are in conflict with the official position taken by the United States Government at the Hague Conference in 1955, that Article 3(2) of the Convention does not impose the sanction of denial of limitation of liability for failure to give "notice" in the passenger ticket as to the applicability of the Convention's limits of liability.[9] Moreover, the decisions below conflict with the official position of the United States in refusing to ratify the Hague Protocol of 1955, which did require that "notice" be given in the passenger ticket as to the applicability of Convention limits of liability.[10]

It is the interest of the United Kingdom that the United States of America, and all other contracting parties to the Convention, should give effect to the Convention in accordance with its express terms, and that the uniformity of law which the Convention establishes should not be destroyed or frustrated by the construction placed upon its provisions by the unilateral decisions of the courts of the contracting parties. The United Kingdom therefore urges that the decisions of the courts below should be rejected by this Honorable Court.

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[7] Lowenfeld & Mendelsohn, *The United States And The Warsaw Convention*, 80 Harv. L. Rev. 497, 512 n. 64 (1967).

[8] *E.g., Block* v. *Compagnie Nationale Air France*, 229 F.Supp. 801, 805 (N.D. Ga. 1964), citing *Wyman* v. *Pan Am. Airways, Inc.*, 181 Misc. 963, 43 N.Y.S. 2d 420 (1943), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945).

[9] I. International Conference On Private Air Law, The Hague, Sept. 1955, ICAO Doc. 7686—LC/140 at 134 (1955).

[10] *See generally* Lowenfeld & Mendelsohn, *supra* at 511-546.

II.

The Proceedings Below.

These cases arise out of claims on behalf of passengers on an Alitalia aircraft which crashed on February 26, 1960, while en route from Rome to New York. The passenger tickets were the IATA uniform passenger ticket, heretofore approved by the Civil Aeronautics Board,[11] and which is the standard ticket for virtually all international air traffic. The ticket contained notice thereon that it was subject to the provisions of the Warsaw Convention.

The District Court held that the size of type used in the "notice" provision was so small as to be "virtually invisible", that it did not therefore give adequate notice of the applicability of Convention limitations on liability, and was not in compliance with the provisions of Article 3(1) of the Convention.[12] The defendant carrier was therefore denied the limitations on liability granted by Article 22 of the Convention.

A majority of the Court of Appeals, in affirming the judgment of the District Court, observed that terms of the Convention were "arbitrary limitations on liability which have been severely and repeatedly criticized . . ."[13] They further noted that "a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice."[14] Judge Moore, dissenting in the

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[11] *Pan Am. World Airways, Inc.*, 24 C.A.B. 575 (1957).

[12] *Lisi* v. *Alitalia-Linee Aeree Italiane*, 253 F.Supp. 237 (S.D.N.Y. 1966).

[13] *Lisi* v. *Alitalia-Linee Aeree Italiane*, 370 F.2d 508, 512 (2d Cir. 1966).

[14] *Id.* at 514.

Court of Appeals, stated that "the majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it."[15]

III.

Argument.

(a) The Judgments Below Are Based on a Manifest Dislike For Limited Liability Provisions.

The fundamental purpose of the Warsaw Convention, as its preamble indicates, was to establish uniform documentation and provisions regulating liability in international air transportation. This purpose would be defeated by a unilateral interpretation placed upon the provisions of Article 3(1) by the courts of one of the contracting parties. The way would then be opened to varying or differing interpretations by the courts of other contracting countries, which would reduce the Convention to a meaningless shambles. The end result could only be to impugn the integrity and good faith of countries signatory to such treaties and defeat the essential need for a uniform scheme of applicable law in the field of international air transportation.

The comments of the majority of the Court of Appeals, in criticizing the Convention as "arbitrary" and giving a "one-sided advantage" to the carrier[16] manifest the majority's dislike for the Convention's limitations on liability and supply the motivation for their decision upholding the judgment of the District Court. This action by the majority is aptly characterized by Judge Moore in his dissenting opinion, wherein he stated:

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[15] *Id.* at 515.

[16] *Id.* at 508, 512-513.

> "The majority in their opinion indulge in judicial treaty making.
>
> . . . .
>
> The majority do not approve of the terms of the treaty and, therefore, by judicial fiat, they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability." [17]

The United Kingdom considers that the decision of the majority of the Court of Appeals, based as it was upon their manifest dislike for the limited liability provisions of the Convention, exceeds the proper bounds of judicial interpretation of treaties. Reference is made on this point to the decision of this Court in *Maximov* v. *United States*, 373 U.S. 49, (1963), wherein this Court stated, at page 54:

> " . . . it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."

The United Kingdom joins in the statement of Judge Moore in his dissent below that:

> "The language of the treaty is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem." [18]

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[17] *Id.* at 515.

[18] *Id.* at 515.

(b) Article 3(1) of the Warsaw Convention Contains No Sanction For Failure to Give Notice of Convention Limits of Liability.

Article 3(1) of the Convention, which is the provision here in issue, states the particulars which are to be set forth in the passenger ticket, including:

> "(e) a statement that the carriage is subject to the rules relating to liability established by this Convention."

Nowhere does the Article in question impose any sanction for failure to state the particulars mentioned, nor does it prescribe the form or content of the statement mentioned in (e) above.

Article 3(2) does impose a sanction of denial of limitation of liability for failure to deliver a ticket to the passenger. The courts below would interpolate this same sanction into the provisions of Article 3(1), where it is not expressed.

(c) The Judgments Below Conflict With the History of the Convention and the Official Position of the United States.

The history of the drafting of the Convention has been fully set forth in the briefs heretofore filed in this matter by the petitioner, Alitalia. It is evident from this history that the sanction which the courts below would write into Article 3(1) is contrary to the intention of the drafters of the Convention. They considered and rejected a proposal to deny limitation for failure to give notice in the passenger ticket as to the applicability of Convention liability limits.[19]

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[19] II Conference Internationale de Droit Prive Arien, Oct. 1929, Varsovie, ICAO Doc. 7838, at 100-101, 129, 168 (1930).

Further, the provision which the court below would read into Article 3(1) of the Convention is contrary to the position taken by the United States at the Hague Conference in 1955, that the sanction of unlimited liability does not apply *"if the ticket does not include the notice required by paragraph 1(c) of this Article . . ."* (emphasis added).[20] The decision of the court below also ignores the fact that the Hague Conference of 1955 considered and rejected a proposal by the United States to fix the size of the letters in the notice provision.[21]

Although the Hague Protocol extended the scope of sanctions to the failure to give notice on the passenger ticket of Convention limits of liability, the United States has not ratified or adopted that Protocol.

(d) The Prior Actions of the Civil Aeronautics Board on the Matter of Notice of Convention Limits of Liability Obviate any Need for Judicial Cognizance of the Matter.

In maintaining its position that the uniformity of international agreements should not be disrupted by the unilateral judicial action by the courts of a contracting nation, the United Kingdom is not unmindful of the views expressed by this Honorable Court as to matters affecting the foreign relations of a country. Reference is made to the comments of this Court in *Baker* v. *Carr*, 369 U.S. 186 (1961), as follows:

> "There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues fre-

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[20] I International Conference on Private Air Law, The Hague, Sept. 1955, ICAO Doc. 7686—LC/140 at 134 (1955).

[21] *Id.* at 124.

quently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or the legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet, it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of the management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action."

In keeping with the foregoing views expressed by this Court it is submitted that reference to the recent history of the Warsaw Convention would show that the issue here raised has been dealt with by the political or executive branch of the United States Government and would not appear to require judicial cognizance.

It has been noted elsewhere in the briefs submitted in this matter that the form of ticket in issue had the express approval of the Civil Aeronautics Board in 1957. In 1963 the said Board, acting within its jurisdiction over airline carriers, saw fit to prescribe by regulation[22] the form of notice of Convention liability limits which it deemed to be adequate. This notice took the form of signs posted on ticket counters and, at the carrier's option, separate printed statement on the ticket envelope, or the ticket itself. The United Kingdom deems it to be significant that in the exercise of its so-called "expertise" to deal with these matters the said Board perceived no need to alter, amend or modify the provisions of the Convention and deemed its prescribed form of notice to be adequate. In light of this action by the executive branch of a contracting country it is not per-

[22] 14 C.F.R. § 221. 175 (1967).

ceived why there should remain any issues for judicial cognizance by the courts of the same country, or why such judicial action should be at variance with that of the contracting country.

(e) A Decision of this Court Upholding the Judgments Below Would Imperil the Limitation Provisions of the Montreal Agreement.

Further, the United Kingdom looks with grave concern to the consequences which the upholding of the decision of the courts below would have upon the most recent attempts to achieve uniformity of law in the limitation of liability for airline accidents.

Between the dates of June 20, 1957 and November 15, 1965 the legislative and executive branches of the United States Government were unable to resolve or agree upon the problems presented by the Hague Protocol amendments to the Warsaw Convention. Various proposals were considered by appropriate committees of the Congress and the departments of the Executive. These proposals ranged from withdrawal from the Warsaw Convention to the adoption of the Hague Protocol, supplemented by a compulsory insurance scheme paid for by the air lines. Finally, on November 15, 1965 the United States of America issued its denunciation of the Warsaw Convention,[23] to become effective within six months thereafter, pursuant to the terms of the Convention.[24] This denunciation was subsequently withdrawn on May 13, 1966[25] in consequence of an agreement reached at the International Civil Aviation Organization Conference in Montreal in May, 1966. This agreement between air carriers engaged in international

[23] 53 Dep't State Bull. 923 (1965).

[24] Warsaw Convention art. 39, 49 Stat. 3022.

[25] 54 Dep't State Bull. 955 (1966).

transportation provided for an increase to $75,000 in the limits of liability, and for liability without fault. Thus, the withdrawal by the United States of its denunciation of the Warsaw Convention served to reaffirm its policy to maintain uniformity of law in international air transportation, in preference to unlimited liability in international airplane disasters.

The Montreal agreement[36] contains a provision for a ticket envelope insert, in ten point type, giving notice of its limitations of liability.[37] A decision of this Court affirming the judgments below opens the prospect that the notice provision of the Montreal agreement would likewise be subjected to future judicial examination, by the courts of the United States, with the possible outcome that if the form of notice therein prescribed should also be found inadequate by the United States Courts the contracting carriers would be subjected to absolute liability without the right to limitation.

CONCLUSION

The issue presented in the instant cases far transcends the mere question of the sufficiency of the type used on the "notice" provision of the standard passenger ticket. The real issue is whether the decision of the Court of Appeals directly conflicts with the provisions of the Warsaw Convention and whether the courts of a member state should be permitted to rewrite the Convention because of their disapproval of a particular provision. Such unilateral action by the courts of the United States directly conflicts with the manifest intention of the drafters of the Convention who rejected a proposed provision which would have

[36] Sometimes known or referred to as the "Special" or "Interim" agreement.

[37] 31Fed. Reg. 7302 (1966).

penalized a carrier for failure to notify a passenger of the application of the Convention. It conflicts with the position taken by the United States at the Hague Conference in 1955, that the sanction of unlimited liability does not apply where a passenger ticket fails to give notice of provisions of the Convention, and it conflicts with the refusal of the United States to ratify the Hague Protocol which does contain the sanction of unlimited liability where a passenger ticket fails to give notice of the provisions of the Convention.

Affirmation of the judgments below would result in unlimited liability for air carriers in the United States. This result, coupled with the liability without fault established in the Montreal agreement would place upon air carriers an unbearable burden and would inevitably lead to the necessity for formulating new measures which would survive unilateral court interpretation. If the decision of the Court of Appeals is to be confirmed the Government of the United Kingdom is concerned that it should have to take appropriate action to protect its carriers from unlimited liability regardless of fault.

It is therefore respectfully urged that the judgment of the court below should be reversed and that there should not be read into the Warsaw Convention provisions which are not to be found in its express wording.

Respectfully submitted,

EDWIN LONGCOPE
26 Broadway
New York, New York 10004
Attorney for the United Kingdom of Great Britain and Northern Ireland

December 20, 1967

Certificate of Service

I hereby certify that copies of this motion and the attached brief have been served upon

AUSTIN P. MAGNER, Esquire
GEORGE N. TOMPKINS, JR., Esquire
Counsel for Petitioner
One Rockefeller Plaza
New York, New York 10020

THEODORE E. WOLCOTT, Esquire
Attorney for Respondents
36 West 44th Street
New York, New York 10036

HAROLD L. WARNER, JR., Esquire
Attorney for International Transport Association
25 Broadway
New York, New York 10004

JOHN E. STEPHEN, Esquire
JOSEPH F. HEALY, JR., Esquire
Attorneys for Air Transport Association of America
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

THE SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20630

STUART M. SPEISER
Counsel for Arnold Holtzman
200 Park Avenue
New York, New York 10017

ALFRED C. CLAPP
Counsel for the Republic of Italy
44 Broad Street
Newark, N. J.

Such service was made by posting the foregoing documents by first class mail.

EDWIN LONGCOPE